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No. 84-188

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ENERGY RESERVES GROUP, INC., *et al.*,
Petitioners,

v.

DEPARTMENT OF ENERGY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

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REPLY BRIEF

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REPLY BRIEF

This case poses several important issues arising in the wake of *Immigration & Naturalization Service v. Chadha*, 103 S. Ct. 2764 (1983). These relate to (1) the retroactive applicability of *Chadha*, (2) the appropriate standard for determining whether one-house veto provisions are severable, (3) the enforceability of regulations whose substance and duration were shaped by the existence and use of the unconstitutional veto power, and (4) the effect to be given presidential orders that were unconstitutionally vetoed. The oppositions submitted by the Department of Energy (DOE Opp.) and the intervenor respondents (Int. Opp.) do not diminish the special and important reasons for review of these issues by this Court.

As a threshold matter, DOE urges that the petition should be denied because the Emergency Petroleum Allocation Act of 1973 (EPAA) and the Energy Policy and Conservation Act of 1975 (EPCA) have expired and the case therefore supposedly "involves no question of the authority of the Executive to continue to exercise regulatory authority under a statute containing legislative veto provi-

sions." DOE Opp. 11. This contention is patently wrong. DOE's authority to initiate and prosecute enforcement actions under the statutes survives, 15 U.S.C. § 760g (1982), and the agency is now pressing hundreds of such actions involving billions of dollars.[1] In the stripper well litigation alone, hundreds of millions of dollars are at stake. This case thus manifestly does involve the continuing exercise of regulatory authority under statutes containing veto provisions. More than that, the regulatory program sought to be enforced was shaped in large part by the presence and exercise of the veto power.[2]

1. *Supposed "Ratification" Of The Congressional Vetoes.* Congress twice vetoed presidential orders that would have phased out crude oil price controls. It is undisputed that by these vetoes Congress exceeded its constitutional powers. DOE now strains to make the vetoes vanish. It contends that the unconstitutional congressional vetoes were "effectively ratified" by subsequent extension of the EPAA and enactment of the EPCA and,

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[1] During oral argument in this case before the Temporary Emergency Court of Appeals (TECA) on May 10, 1984, counsel for DOE informed the court that over 550 enforcement cases are pending before the agency or in litigation.

[2] DOE suggests that the petitioners "failed to raise their challenge in a timely fashion." DOE Opp. 12. This suggestion is groundless. The district courts considered the *Chadha* issues to be timely raised and certified them to TECA. Pet. App. 56a-58a, 89a-90a. DOE did not allege laches before TECA, and no laches bar can be made out. The petitioners' argument under *Chadha* is in the nature of a defense against enforcement of the statutes, and laches does not "run against a defense." *Mobil Oil Corp. v. DOE*, 728 F.2d 1477, 1487 (TECA 1983), *cert. denied*, 104 S. Ct. 3545 (1984). Moreover, there was no inexcusable delay or prejudice, the elements essential to a laches defense. *Id.* at 1488; *see Allen v. Carmen*, 578 F. Supp. 951, 962-63 (D.D.C. 1983). In particular, the *Chadha* issues were raised soon after the district courts disposed of the principal regulatory and statutory issues in these cases; it was only then that it became appropriate to consider constitutional issues in any event.

accordingly, that no "actual violation" of the Constitution occurred. *E.g.*, DOE Opp. 13-14. This contention, which is central to DOE's argument on almost every question presented, *see* DOE Opp. 13-14, 22-23, 24, 27, has no basis in constitutional principle.

The immediate effect of the unconstitutional vetoes was to block the President's decontrol orders. Under the first of those orders, the price control program would have been phased out in 30 months. Such a phase-out would have materially reduced the amount of the overcharges now alleged against the petitioners. No case or doctrine supports DOE's contention that unconstitutional legislative action with such consequences can be placed beyond reach of judicial relief by subsequent "ratification." This Court has long recognized that "whatever the legislature could not have authorized originally it cannot confirm." *Turpin v. Lemon*, 187 U.S. 51, 57 (1902). Congress could not authorize itself to exercise a legislative veto and therefore was powerless to ratify that exercise. In arguing the contrary, DOE relies exclusively on *Swayne & Hoyt, Ltd. v. United States*, 300 U.S. 297 (1937). That case, however, involved ratification by Congress of allegedly invalid *executive* action, on the familiar ground that Congress subsequently may "ratify . . . acts which it might have authorized." *Id.* at 301-02. Nothing in *Swayne* suggests that Congress could ratify its own prior legislative vetoes, for those vetoes were unconstitutional in the first instance.

DOE's novel ratification argument ultimately rests upon the theory that by signing the bills extending the EPAA and enacting the EPCA, President Ford approved the prior legislative vetoes that had blocked his decontrol orders. Those enactments, however, were neutral concerning the legislative vetoes and did not themselves purport to nullify the presidential decontrol orders. Certainly in such circumstances subsequent legislation cannot be

deemed to ratify or give validity to previous unconstitutional legislative acts. *See Town of South Ottawa v. Perkins*, 94 U.S. 260, 270 (1876). Moreover, President Ford's contemporaneous statements show that he had not changed his mind about phased decontrol but rather had been compelled to accept a continuation of controls as a result of congressional exercise of the veto power.[3]

DOE's theory affronts common sense by sanctioning congressional exploitation of the very procedure that this Court held unconstitutional in *Chadha*. In effect, DOE argues that if congressional vetoes thwart the President's will and force him to accept a bill that he otherwise would not have accepted, the resulting legislation cures the constitutional defect in the vetoes. But presidential acquiescence in action that infringes constitutional limits on the power of Congress does not shield the trespass from judicial review. Thus, in *Chadha*, this Court rejected the claim that a veto provision is "somehow immunized from constitutional scrutiny because the Act containing [it] was passed by Congress and approved by the President." 103 S. Ct. at 2779 n.13.[4] Here, equally, there is no merit in DOE's contention that actual legislative vetoes can somehow be immunized because the President signed subsequent legislation wrought by the force of the vetoes themselves.

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[3] President Ford's remarks upon signing the EPAA extension act and the EPCA reflect his frustration over the proven effectiveness of the veto provisions in thwarting his plans for phased decontrol and also his continuing intention nevertheless to seek to expedite the decontrol of crude oil. *See* II Pub. Papers of Pres. Ford 1538, 1992-93 (Sept. 29, Dec. 22, 1975).

[4] As the court noted in *Consumer Energy Council of America v. FERC*, 673 F.2d 425, 465 n.166 (D.C. Cir. 1982), *aff'd*, 103 S. Ct. 3556 (1983): "The Supreme Court has never hesitated to find an unconstitutional encroachment on presidential authority simply because the President signed the statute at issue."

The failure of DOE's ratification defense vitiates much of its opposition. First, it is not contested that the vetoes violated the Constitution. Absent the supposed ratification, that constitutional violation must be remedied. At a minimum, the vetoed 30-month decontrol order must be given effect, just as effect was given to the vetoed suspension order in *Chadha*.[5]

Second, the actual vetoes were part and parcel of a broader pattern of threatened and potential uses of the unconstitutional veto power that fundamentally shaped the entire substance and the duration of the price control regulations. *See* Pet. 22-26. This unconstitutional taint is also beyond cure through supposed ratification and thus requires judicial correction. The petitioners do not, as DOE suggests, propose that this Court speculate as to what program the President would have promulgated in the absence of unconstitutional legislative coercion. *See* DOE Opp. 26. The proper remedy is to prohibit continued enforcement of the regulations. *See Allen v. Carmen*, 578 F. Supp. 951 (D.D.C. 1983).

Third, DOE's objection to petitioners' standing, DOE Opp. 14-15, is plainly erroneous because the vetoes indisputably had an impact on the petitioners.[6] Even if the vetoes could be ignored, the petitioners would have standing based on the veto provisions themselves. Standing requires only that the petitioners assert an "actual or threatened injury" that "can be traced" to the statutes at

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[5] DOE has abandoned its contention before TECA that the President's decontrol orders were invalid. The intervenor respondents do make that argument, *see* Int. Opp. 17-18, but it is without merit. *See* Pet. 27-28.

[6] Had it not been vetoed, the President's 30-month decontrol order would have allowed lower-tier crude oil, then subject to an average controlled price of $5.25, steadily to rise to the uncontrolled price, which averaged $12.25 in July 1975. *See* Pet. 26 n.25; Pet. App. 239a, 246a-47a. TECA properly upheld the petitioners' standing in view of this unquestioned injury. Pet. App. 30a.

issue and "redressed by a favorable decision." *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). DOE's attempt to enforce the price regulations obviously constitutes "direct, pocketbook injury" traceable to the challenged statutes. *Barrows v. Jackson*, 346 U.S. 249, 256 (1953).[7] The injury is redressable because if the veto provisions are inseverable, DOE's enforcement actions against the petitioners, like the deportation order in *Chadha*, "will be cancelled." 103 S. Ct. at 2776.

2. *Retroactivity.* As noted in the petition, TECA's refusal to give retroactive effect to *Chadha* is inconsistent with the clear import of that decision, with this Court's summary affirmances in *Consumers Union* and *Consumer Energy Council*, and with the great weight of lower court authority. Pet. 11-12. Since the petition was filed, the Second Circuit has ruled that *Chadha* applies to previously-enacted statutes and has therefore invalidated the entire Reorganization Act of 1977, 5 U.S.C. §§ 901-912 (1982), on the ground that it contained an inseverable legislative veto provision. *EEOC v. CBS, Inc.*, 743 F.2d 969 (2d Cir. 1984), *petition for reh'g en banc filed* (Sept. 11, 1984).[8] There is thus a conflict among the courts of appeals on the issue of retroactivity presented here.

In defending the decision below, DOE misapplies the three-part test set forth in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). As to the first factor, *Chadha* clearly was foreshadowed by a respectable body of opinion which

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[7] Contrary to DOE's suggestion, DOE Opp. 14-15, it makes no difference whether the injury is traceable to the invalid provision itself or to other sections of the statute. A party may challenge or defend against enforcement of a statutory provision on the ground that it is inseverable from an invalid provision of the same statute. *Dorchy v. Kansas*, 264 U.S. 286, 288-89 (1924).

[8] Although the Reorganization Act issue in *CBS* may have been mooted by recent legislation, *see* Pub. L. No. 98-532, 98 Stat. 2705 (1984), the conflict remains because the Second Circuit can be expected to continue to apply *Chadha* retroactively in other contexts.

supported the position ultimately taken by this Court. *See EEOC v. CBS, Inc.*, 743 F.2d at 972-73. Indeed, the government itself currently is arguing in other litigation that *Chadha* came as no great surprise.[9] In addressing the second factor—whether retroactive application would further or retard the operation of *Chadha*—DOE again resorts to the fiction that the unconstitutional action of Congress in this case was erased by effective ratification. DOE Opp. 23. Finally, with regard to considerations of equity, DOE errs in suggesting that retroactive application might undo completed transactions and final judgments. DOE Opp. 23. Retroactive application would be constrained by statutes of limitations and the doctrine of res judicata. Pet. 15. By contrast, substantial inequity would result from failing to apply *Chadha* in the present enforcement proceedings against the petitioners, who have already incurred enormous, unredressable injury because of prior application of these unconstitutional controls.

3. *Severability.* In its ruling on severability, TECA resolved a question of great importance under a patently erroneous legal standard. TECA found the legislative veto provisions severable because "the question is not whether Congress would have enacted these *exact* statutes had it known at the time of enactment that the legislative veto provisions were invalid, but rather, whether Congress would have preferred these statutes, after severance of the legislative veto provisions, to no statutes at all." *Gulf Oil Corp. v. Dyke*, 734 F.2d 797, 804 (TECA 1984)

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[9] The government contends elsewhere that "[i]n 1978, when the [Airline] Deregulation Act was passed, Congress was fully aware of the serious doubts regarding the validity of the legislative veto, and it knew that the veto provision could be struck down at any time." *See* Appellant's Brief, dated October 15, 1984, at 27, *Alaska Airlines, Inc. v. Donovan*, No. 84-5442 (D.C. Cir.). The brief cites the long-standing position of the Executive Branch, the arguments of a number of legal scholars, and the split decision "narrowly" upholding the veto in *Atkins v. United States*, 556 F.2d 1028 (Ct. Cl. 1977), *cert. denied*, 434 U.S. 1009 (1978).

(emphasis in original), *cert. denied*, 53 U.S.L.W. 3239 (U.S. Oct. 2, 1984) (followed by TECA in these proceedings, Pet. App. 36a). DOE endorses TECA's test, asserting that the court properly declined to consider "whether Congress might have enacted some *other* version of a price control statute," DOE Opp. 16 n.7 (emphasis in original), and that the petitioners cannot prevail unless it is found that "Congress would have refrained altogether from imposing any price controls." DOE Opp. 10.

The test adopted by TECA directly conflicts with this Court's consistent teaching for more than half a century that the entire statute must fall if "it is evident that the Legislature would not have enacted those provisions which are within its power, independently of that which is not." *Chadha*, 103 S. Ct. at 2774. Under that standard, inseverability does not require a judicial conclusion that no legislation would have been enacted. Challenged legislation must fall if Congress would have enacted *either* no statute at all *or* a different statute.

Thus, DOE entirely misses the point in asserting that it is "inconceivable" that Congress would have failed to enact some program of price controls. DOE Opp. 17.[10] The question is not whether there would have been *some* controls but whether there would have been the *same* controls.[11] The invalid legislative veto device enabled a par-

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[10] In view of the intense inter-Branch conflict over energy poilicy, *see* Pet. 17-22, a permanent stalemate would have been entirely conceivable had it been known that the legislative veto was not available as a ground of compromise. The President and Congress battled over the provisions of the EPCA for a year. Upon signing the EPCA, President Ford noted: "If I were to veto this bill, the debates of the past year would almost surely continue through the election year and beyond." II Pub. Papers of Pres. Ford 1993 (Dec. 22, 1975).

[11] DOE complains that the petitioners have not identified "any obvious alternative that Congress would have enacted." DOE Opp. 16 n.7. But precisely what would have happened is unknowable and need not be ascertained. There are several obvious possibilities. Perhaps there would have been no statute, perhaps inflexible controls would have been mandated for a shorter time, or perhaps higher prices would have been authorized.

ticular political compromise to be reached, under which the President obtained the authority to lift or relax controls while Congress was assured the final say. Had Congress known the legislative veto was unavailable, a different political result would have ensued. These particular statutes would not have been enacted. Pet. 17-22.[12]

DOE contends that the EPAA and the EPCA nevertheless should be saved on the ground that, after severance of the veto provisions, they could remain technically operative as "report and wait" laws. DOE Opp. 16-17. It is, however, irrelevant that the valid provisions might be technically operative unless Congress intended them to stand independently. *Lynch v. United States*, 292 U.S. 571, 586 (1934); *see Chadha*, 103 S. Ct. at 2774-75. Congress would not have enacted the EPAA and the EPCA as "report and wait" laws because Congress wanted to be able to "override" presidential initiatives, 119 Cong. Rec. 36,866 (1973) (Chairman Staggers), and the extremely short waiting periods (five days under the EPAA and fifteen days under the EPCA) would not have given Congress time to enact overriding legislation after a presidential "report." In sum, the legislative history in

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[12] The intervenor respondents argue that the legislative veto provisions are inseverable from the presidential decontrol authority and that both should be severed from the statutes, leaving only the mandatory control authority. Int. Opp. 7-13. But severance is never permissible where the valid provisions, standing alone as enacted, would "create a program quite different from the one the legislature actually adopted." *Sloan v. Lemon*, 413 U.S. 825, 834 (1973). Here, Congress contemplated decontrol measures, and even though President Ford's crude oil decontrol measures were thwarted through the legislative veto device, other aspects of DOE's program eventually were shaped as much by the decontrol authority as by mandatory controls. By 1980, more than half, by volume, of all refined petroleum products had been decontrolled by Presidents Ford and Carter. *Cf.* DOE Opp. 27. Hence, severance of both the decontrol authority and the legislative veto provisions would create a regulatory program that bears scant resemblance to the one "actually adopted."

every respect shows unmistakably that Congress intended the statutes to stand or fall as a whole.[13]

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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[13] As shown in the petition, Congress deliberately omitted severability clauses from both the EPAA and the EPCA. Pet. 19 n.15, 21. DOE wrongly suggests, DOE Opp. 21 n.12, that the EPAA includes an "implicit" severability clause by incorporation of § 211(g) of the Economic Stabilization Act of 1970 (ESA), *as amended*. Pet. App. 139a-40a. Section 211(g) simply grants exclusive jurisdiction over EPAA cases, in a manner that is neutral on the question of severability. If Congress had sought to include a severability provision in the EPAA, it would have incorporated the ESA's distinct and explicit severability provision, § 220. *See* Pet. 19 n.15.